ABSOLUTE IMMUNITY IN DEFAMATION: JUDICIAL PROCEEDINGS.

Some restrictions upon the application of the doctrine of absolute immunity have been advanced. It has been asserted that the purpose with which a publication in the course of a judicial proceeding is made, may be, under certain circumstances, a material consideration. In other words, it is said that a protected publication must be made not only in the course, but for the purpose, of a judicial proceeding. It is the universal rule that when the circumstances are such as to raise doubts whether a publication was made in the course of a judicial proceeding, this issue of fact must be submitted to the jury.[1] A complaint may, however, be made in the course of a judicial proceeding, and yet the circumstances may indicate that it was made, not with the purpose of pursuing a judicial remedy in the regular course, but as a pretence to promulgate slander, or to serve some other unlawful purpose. It has been asserted that no privilege extends to such a misuse of the forms of law; otherwise, in view of the restricted scope of the action for malicious prosecution, such a wrong would be without a remedy.[2] But this qualification of the general rule

[1]See particularly Wright *v.* Lothrop (1889) 149 Mass. 385; Allen *v.* Crofoot (N. Y. 1829) 2 Wend. 515; McGraw *v.* Hamilton (1898) 184 Pa. St. 108; Trotman *v.* Dunn (1815) 4 Camp. 211.

[2]Briggs *v.* Byrd (N. C. 1851) 12 Ired. 377 (where the words were spoken to a justice in applying for a warrant, which was refused at the time under a promise to attend to it later, but no further application was made). It was held that the jury had been correctly instructed that if they believed the application to the magistrate was *bona fide* for the purpose of obtaining a warrant, and for no other purpose, the defendant was not answerable for the words spoken. The broad language used by Ruffin, C. J., who delivered the opinion of the court, would, however, obliterate the fundamental distinction between absolute and conditional immunity. This case was cited in Shelfer *v.* Gooding (1855) 47 N. C. 175, and Nissen *v.* Cramer (1889) 104 N. C. 574. In the former, Battle, J., distinguishing the case from the one at bar, says, "It is manifest then, that if his application for the warrant was not an honest one with a view to a criminal prosecution, his words could not be protected as having been made in the course of a judicial proceeding. In this view the language of the Chief Justice may be justified without in any degree impugning our principle." Hill *v.* Miles (1837) 9 N. H. 9 (where a warrant for theft had been secured but was not served): "There is evidence in this case, however, tending to show that the defendant made a complaint and procured a warrant, not for the legitimate purpose of having the plaintiff arrested and examined, as he might well have done had there been probable cause to believe him guilty of larceny, but with a view to aid himself in the civil suit which he commenced at the same time, and with the intention of enforcing payment for the oxen. * * * If such was his purpose it was wholly unwarranted and illegal; and in such case the defendant cannot protect himself by alleging that he made the charge in the due course of legal proceedings. We are of opinion that if a party institutes legal process without intending to pursue it in the regular course, but as

excluding all inquiry into good faith in relation to publications made in the course of judicial proceedings has been declared to be unsound. If pleadings were shown to be false and malicious

a pretence to promulgate slander, or serve any other improper purpose, no privilege extends to such a misuse of the forms of law, and he may be prosecuted for any libelous matter which he thus publishes." Bunton *v.* Warley (Ky. 1815) 4 Bibb 38 (words spoken in part before a justice in applying for a warrant): "A mere pretence, under the cloak of a prosecution, to obtain the greater latitude for defamation free from responsibility must be guarded against." In Gray *v.* Pentland (Pa. 1815) 2 S. & R. 23 (where the publication was not in the course of a judicial proceeding) Tilghman, C. J., said: "Yet Serjeant Hawkins is of opinion, that if one should institute a judicial proceeding out of pure malice, and with intent, not to carry it through, but to expose the character of his neighbor under show of law, it would be indictable as a libel. 1 Hawk., bk. 1, ch. 73, sec. 8. This opinion is founded on strong reason, because the perverting of process from its true use to the gratification of malice is a fraud in law." The query was raised in Newfield *v.* Copperman (N. Y. 1873) 15 Abb. Pr., N. S. 360, whether an action would lie if a defendant expressly manufactured the occasion on which he bore false witness. Liske *v.* Stevenson (1894) 58 Mo. App. 220, was a plain case of publication to a person who was a justice of the peace, but not for the purpose of pursuing a legal remedy. See also Marshall *v.* Gunter (S. C. 1853) 6 Rich. 419; Pierce *v.* Oard (1888) 23 Neb. 828, and the dissenting opinion in Crockett *v.* McLanahan (1902) 109 Tenn. 517.

The matter has also arisen upon pleadings. Forbes *v.* Johnson (Ky. 1850) 11 B. Mon. 48 (where the complaint embodied only extracts from the defamatory pleadings): "The principle is well settled, and is indeed essential to the ends of justice, which demand that there should be a free resort to judicial tribunals and to the remedies furnished by the law, that words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal to which they are addressed and to the remedy sought in that tribunal, are not actionable though they be false, unless the proceedings were resorted to merely for the purpose of conveying the scandal and as a cover for the malice of the party, and not in good faith for the assertion of a right or the redress of a wrong. * * * The paper charged to be a libel seems, so far as it is shown in the declaration, to be properly and aptly framed for obtaining relief, * * * if it be taken as a bill in chancery filed for the purpose. * * * We think it is not actionable as a libel, without such additional averments as would show it was resorted to merely as the vehicle of slander and malice and not in good faith as a remedy in a court of justice. And as it purports to be a bill in chancery laying a proper ground for relief in a court of equity, we are of opinion that although the declaration professing to state only a part of its contents, does not state any prayer, yet as there is no averment that it was not filed as a bill in chancery, or that it was otherwise published than as a bill in chancery, it is to be taken *prima facie* to be what it purports to be, and is therefore not properly the ground of an action though its allegations be untrue, unless it were shown in the declaration that it was filed in bad faith, and merely for the purpose of slander." Dada *v.* Piper (N. Y. 1886) 41 Hun 254 (where the libelous publication appeared in a complaint which was dismissed for failure to state a cause of action; the plaintiff in the libel action introduced the complaint in evidence and rested): "Until it is shown that the defendant acted with express malice and was using the judicial forms in bad faith for the purpose of assailing plaintiff's character, the presumption must be extended to the defendant that the complaint was a privileged communication. * * * The plaintiff should have gone further than proving a complaint in a judicial proceeding, because that in the present case was privileged. He should have shown, in addition, that the defendant knew that what he alleged was false; that he was actuated by malice, or that he

it might well be concluded by a jury that they were employed as a cover for defamation. The proof that would establish the facts of malice and falsity would also establish the other fact of a ficticious suit; and thus the distinction between absolute and conditional immunity would be lost.[3]

It is commonly stated in this country that the court or tribunal must have jurisdiction of the proceeding.[4] But there is no modern

made use of legal proceedings in bad faith as a cloak to his libelous statements." Suydam *v.* Moffat (N. Y. 1848) 1 Sandf. 459; Shadden *v.* McElwee (1887) 86 Tenn. 146, and Marsh *v.* Ellsworth (1872) 50 N. Y. 309, which are occasionally cited in this connection, seem to have no direct bearing upon it.

[3]Runge *v.* Franklin (1889) 72 Tex. 585. In this case the publication complained of was a petition for an injunction and a receiver. It was alleged that the publicity following the institution of the proceeding having served its purpose, the pretended suit was dismissed before the demurrer which had been interposed had been acted upon. In Johnson *v.* Brown (1878) 13 W. Va. 71, although this question was not involved, the court refers to some of the foregoing cases and adds that "It may be questioned whether the law, as thus stated, is not a dangerous innovation upon the principle that libelous statements contained in pleadings are absolutely privileged." In Link *v.* Moore (N. Y. 1895) 84 Hun 118, the doctrine advanced in Dada *v.* Piper (N. Y. 1886) 41 Hun 254, *supra*, is expressly denied. "The judge delivering the opinion of the General Term assumed that the action could have been maintained had the plaintiff shown the falsity of the charges contained in the complaint alleged to be libelous, and that said charges were malicious and in bad faith on the part of the pleader. But this assumption was *obiter* and cannot be deemed an authority." In Holmes *v.* Johnson (1852) 44 N. C. 44, an action for malicious prosecution was sustained where a warrant for larceny had been issued but not served. "If he be not allowed to avail himself of this action, he is entirely without remedy. He cannot sue for the slanderous words merely, because they were spoken in the course of a judicial proceeding. His reputation, it must be admitted, must be as much injured where the warrant was only sued out from a justice, and not put into the hands of an officer, as if it had been prosecuted to the utmost extent. Nay more, for in the latter case the latter might have vindicated his character by proving his innocence." See also the recent case of Halberstadt *v.* N. Y. Life Ins. Co. (1909) 194 N. Y. 1.

[4]Hoar *v.* Wood (Mass. 1841) 3 Metc. 193; Morrow *v.* Wheeler & Wilson Mfg. Co. (1896) 165 Mass. 349; Laing *v.* Mitten (1904) 185 Mass. 233; Johnson *v.* Brown (1878) 13 W. Va. 71; Jones *v.* Brownlee (1901) 161 Mo. 258; Bartlett *v.* Christhilf (1888) 69 Md. 219; Wilson *v.* Sullivan (1888) 81 Ga. 238; Kemper *v.* Fort (1907) 219 Pa. St. 85; Ball *v.* Rawles (1892) 93 Cal. 222; Abbott *v.* Nat. Bk. of Commerce (1899) 20 Wash. 552; Forbes *v.* Johnson (Ky. 1850) 11 B. Mon. 48; Hill *v.* Miles (1837) 9 N. H. 9; Duncan *v.* Atchinson etc. R. Co. (1896) 72 Fed. 808. "It seems to me, that the weight of authority, as well as reason, is in favor of holding, that no pleading filed in a court, which has no jurisdiction of the subject matter, ought to be regarded as an absolutely privileged communication. It does not seem to me necessary, that it should be so regarded in order to uphold the public policy, on which these absolutely privileged communications are based. The public policy only requires, that suitors may resort to the courts, established by law to hear their causes, and that, having so done, they may without fear of being sued for a libel, allege whatever they choose in support of their cause. But the public policy does not require, that parties should be permitted to resort to courts, not established by law to hear their causes, and in such courts

case in which immunity was denied for want of jurisdiction.[5] In England it was held in an early case that a charge made before a tribunal having no jurisdiction is actionable;[6] but the contrary view was also asserted.[7] In England, at all events, it would now seem to be sufficient if the proceeding, so far as the party defaming has any reason to believe, is lawful and conducted with apparent regularity.[8] Extreme cases may be suggested, in which,

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publish libelous matters with absolute impunity. The judgment of such a court is held to be an absolute nullity; and pleadings in it ought not to be absolutely privileged from being considered libelous." Johnson *v.* Brown (1878) 13 W. Va. 71, 133.

[5]On the other hand, in Kilbourn *v.* Thompson (1880) 103 U. S. 168, the constitutional privilege of members of Congress protected the members although they acted without jurisdiction. In Runge *v.* Franklin (1889) 72 Tex. 585, the court apparently favors the view that want of jurisdiction would not affect immunity. In Thorn *v.* Blanchard (N. Y. 1809) 5 Johns. 508, it is said to be at least doubtful whether want of jurisdiction in the court would be fatal.

[6]Buckley *v.* Wood (1590) 4 Rep. 14, a, where the suit was brought for libelous matter contained in a bill filed in the Star Chamber by the defendant against the plaintiff, charging him with divers matters examinable in that court, and also with being a maintainer of pirates and murderers, which was not examinable in that court. It was held that "For any matter contained in the bill that was examinable in said court no action lies, although the matter is merely false, because it was in the course of justice. But for the words not examinable in said court an action on the case lies, for that cannot be in the course of justice; for the court has no power or jurisdiction to do that which appertains to justice, nor to punish these offences; and if such matters can be inserted in a bill in so high and honorable a court, in great slander of the parties, and they cannot answer it to clear themselves, nor to have their actions, as well to clear themselves of the crimes, as to recover damages for the great injuries and wrongs done them, great injury will ensue; but the libel, without any remedy given the party, will remain always on record to his shame and infamy, which will be full of great inconvenience." See also Weston *v.* Dobinet (1618) Cro. Jac. 432.

[7]Lake *v.* King (1670) 1 Mod. 58; 1 Saund. 131, n. The reason given is that the mistake of the court in which the suit is brought is not the fault of the party but is the fault of his counsel. Gwinne *v.* Poole, 2 Lutw. 1571.

[8]Bower, Actionable Defamation, 100, 371. The question of jurisdiction was discussed in connection with immunity for reports of judicial proceedings in Usill *v.* Hales (1818) 3 C. P. D. 319. In this case Lord Coleridge, C. J., drew a distinction between "inherent want of jurisdiction on account of the nature of the complaint", and "what may be called resulting want of jurisdiction because the facts do not make out the charge." But Lopes, J. states the proposition without any such qualification: "The cases are clear to shew that want of jurisdiction will not take away the privilege if it is maintainable on other grounds." The further discussion of this question would take us too far afield; but some of the leading cases concerning the exercise of judicial authority may be mentioned: Yates *v.* Lansing (N. Y. 1810) 5 Johns. 282; Bradley *v.* Fisher (U. S. 1871) 13 Wall. 335; Lange *v.* Benedict (1878) 73 N. Y. 12; Austin *v.* Vrooman (1891) 128 N. Y. 229; Grove *v.* Van Duyn (1882) 44 N. J. L. 654; Vaughn *v.* Congdon (1883) 56 Vt. 111.

In Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461 (where an affidavit voluntarily made by a physician to a justice of the peace as part of the

however, the irregularity would be apparent. On the other hand, any requirement in this respect would seem to bear heavily upon judge, counsel and party, and in less degree upon jurors and witnesses. It is again necessary, in this connection, to call attention to the distinction between questions of jurisdiction and of the proper exercise of jurisdiction.[9]

It was formerly the rule in England that publications in judicial proceedings were absolutely privileged only when they were relevant or pertinent to the proceeding.[10] But this limitation has now been abandoned in England, and immunity attaches, as pointed out above, to every publication in the course of judicial proceedings which has reference or relation thereto, although it

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statutory procedure for the detention of insane persons was held to be absolutely privileged) the court said: "If the evidence given by the defendant was furnished voluntarily, I apprehend that it was necessary for him to satisfy himself and to show to the court, that the proceeding was regular, and the magistrates had jurisdiction of the case. Where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent general or ordinary jurisdiction, and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case. But where a man intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another." But in Barrett *v.* Kearns [1905] 1 K. B. 504, an inquiry before a commission issued by the bishop of a diocese under the Pluralities Act, where it was urged that it had not been made clear that all the conditions contained in the statutes in relation to the constitution had been complied with, it was held that the principle *omnia presumuntur rite esse acta* applied.

[9]In Wilson *v.* Sullivan (1888) 81 Ga. 238 (involving allegations in a bill for injunction), where the declaration alleged want of jurisdiction, but jurisdiction was sustained, the court adds: "What the declaration really means, no doubt, is that the bill did not state a good case for injunction; but the test of jurisdiction to entertain a bill for injunction is not whether good cause for granting the injunction is set forth in the bill, but whether the court, or its organ, the judge, could grant it for any cause. If the tribunal applied to can grant the injunction for any cause, then any question about cause is not a question of jurisdiction, but of the proper exercise of jurisdiction. An injunction granted without jurisdiction is void, but one granted by a competent tribunal for insufficient cause, though erroneous, is valid and binding until vacated or set aside."

[10]Brook *v.* Montague (1606) 2 Cro. Jac. 90; Hodgson *v.* Scarlett (1818) 1 B. & Ald. 232; Mackay *v.* Ford (1860) 5 H. & N. 790; Higginson *v.* O'Flaherty (1854) 4 Ir. C. L. R. 125. Relevancy was discussed in Henderson *v.* Broomhead (1859) 4 H. & N. 567; Seaman *v.* Netherclift (1876) 2 C. P. D. 53; Dawkins *v.* Rokeby (1875) L. R. 7 H. L. 752, and Kennedy *v.* Hilliard (1859) 10 Ir. C. L. R. 195, *per* Fitzgerald, B. See Sharswood's Blackstone, ii, 29, 124. The English cases relating to relevancy are reviewed in Kennedy *v.* Hilliard *supra,* and Maulsby *v.* Reifsnider (1888) 69 Md. 143.

may be immaterial or irrelevant to the issues involved.[11] In this country, however, it is almost universally held that the publication must be relevant or material to be absolutely protected.[12] The

[11]In the leading case of Munster *v.* Lamb (1883) 11 Q. B. D. 588, the Court of Appeal stated the modern rule most unequivocally. "For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client; I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant." In the following leading English, Irish and Scotch cases the publications in issue were protected although irrelevant: Munster *v.* Lamb (1883) 11 Q. B. D. 588 (counsel for a person charged with administering drugs to the inmates of the plaintiff's house to facilitate the commission of burglary, suggested, without any foundation in the evidence, that the plaintiff might be keeping drugs at his house for immoral or criminal purposes); Seaman *v.* Netherclift (1876) 2 C. P. D. 53 (defendant, an expert in handwriting, testified in a will case that in his opinion the signature to the will was a forgery; but the jury found in favor of the will, and the judge made some very disparaging remarks with respect to defendant's testimony. Subsequently, while testifying as a witness in a forgery case, defendant was asked on cross-examination whether he had read the judge's remarks on his testimony in the will case. Upon defendant answering in the affirmative, counsel asked no further questions. Whereupon the defendant insisted upon adding, though told by the magistrate to make no further statement concerning the will case, "I believe that will to be a rank forgery, and I shall believe so till the day of my death;" action by an attesting witness. Both question and answer were irrelevant); Scott *v.* Stansfield (1868) L. R. 3 Ex. 220 (judge characterized the defendant in a case on trial, a scrivener, as "a harpy preying on the vitals of the poor"); Kennedy *v.* Hilliard (1859) 10 Ir. C. L. R. 196 (affidavit by party imputing that the plaintiff had suppressed facts and sworn falsely in the prerogative court for the purpose of obtaining letters of administration in the estate of his deceased brother; expunged as scandalous); Primrose *v.* Waterson (1902) 4 R. 783 (a magistrate before whom a child of nine was arraigned on a charge of larceny, sent for the child's father, who was the clubmaster of a workingmen's club, and said to him, "You are not only ruining other people, but you are ruining the boy. I know several families that are going straight to the devil from your club"). In Miller *v.* Hope (1824) 2 Shaw Sc. App. Cas. 125, a judge said of counsel engaged in a case before him, "Mr. Haggart has here, as is his usual practice, stated facts and circumstances of which there is no evidence on the record, and which live in the memory and recollection of that gentleman alone." In Hodgson *v.* Scarlett (1818) 1 B. & Ald. 232, counsel characterized the attorney in a case, who was also involved in the concoction of the facts out of which the case arose, as "a fraudulent and wicked attorney."

[12]In the following classified list of cases the rule is stated or applied.

Judge: Aylesworth *v.* St. John (N. Y. 1881) 25 Hun 156. See also Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461.

Witness: Sheppard *v.* Bryant (1906) 191 Mass. 591; Laing *v.* Mitten (1904) 185 Mass. 233; Wright *v.* Lothrop (1889) 149 Mass. 385; Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461; McLaughlin *v.* Charles (N. Y. 1891) 60 Hun 239; White *v.* Carroll (1870) 42 N. Y. 161; Newfield *v.* Copperman (1877) 42 N. Y. Super. Ct. 302; Cooper *v.* Phipps (1893) 24

only exceptions are that in Maryland the English doctrine has been adopted with respect to witnesses,[13] and in Vermont with respect

Ore. 357; Calkins *v.* Sumner (1860) 13 Wis. 215; Lamberson *v.* Long (1896) 66 Mo. App. 253; Crecelius *v.* Bierman (1894) 59 Mo. App. 513; Steinecke *v.* Marx (1881) 10 Mo. App. 580; Hutchinson *v.* Lewis (1881) 75 Ind. 55; Baldwin *v.* Hutchison (1893) 8 Ind. App. 454; Barnes *v.* McCrate (1851) 32 Me. 442; Hendrix *v.* Daughtry (1907) 3 Ga. App. 481; Buschbaum *v.* Heriot (Ga. 1909) 63 S. E. 645; Liles *v.* Gaster (1885) 42 Ohio St. 631; Emerman *v.* Bruder (1897) 7 Ohio Dec. 311; McDavitt *v.* Boyer (1897) 169 Ill. 475; McNabb *v.* Neal (1900) 88 Ill. App. 571; Acre *v.* Starkweather (1898) 118 Mich. 214; Cooley *v.* Galyon (1902) 109 Tenn. 1; Shadden *v.* McElwee (1887) 86 Tenn. 146; Smith *v.* Howard (1869) 28 Ia. 51.

Counsel: Hoar *v.* Wood (Mass. 1841) 3 Metc. 193; Hastings *v.* Lusk (N. Y. 1839) 22 Wend. 410; Youmans *v.* Smith (1897) 153 N. Y. 214; Marsh *v.* Ellsworth (1872) 50 N. Y. 309; Sickles *v.* Kling (N. Y. 1901) 60 App. Div. 515; Ring *v.* Wheeler (N. Y. 1827) 7 Cow. 725; Maulsby *v.* Reifsnider (1888) 69 Md. 143; Mower *v.* Watson (1839) 11 Vt. 536; Hyde *v.* McCabe (1890) 100 Mo. 412; Jennings *v.* Paine (1855) 4 Wis. 358; Stewart *v.* Hall (1885) 83 Ky. 375; Carpenter *v.* Ashley (1906) 148 Cal. 422; Shelfer *v.* Gooding (1855) 47 N. C. 175; McDavitt *v.* Boyer (1897) 169 Ill. 475; Monroe *v.* Western Lumber Co. (1897) 49 La. Ann. 594.

Party:—Pleadings: Bartlett *v.* Christhilf (1888) 69 Md. 219; Myers *v.* Hodges (1907) 53 Fla. 197; Johnson *v.* Brown (1878) 13 W. Va. 71; Harlow *v.* Carroll (1895) 6 App. D. C. 128; Wilson *v.* Sullivan (1888) 81 Ga. 238; King *v.* McKissick (1903) 126 Fed. 215; McGehee *v.* Insurance Co. (1902) 112 Fed. 853; Union Mutual Life Ins. Co. *v.* Thomas (1897) 83 Fed. 803; Torrey *v.* Field (1838) 10 Vt. 353; Gilbert *v.* People (N. Y. 1845) 1 Denio 41; Dada *v.* Piper (N. Y. 1886) 41 Hun 254; Link *v.* Moore (N. Y. 1895) 84 Hun 118; Moore *v.* Mfrs. Nat. Bank (1890) 123 N. Y. 420; Prescott *v.* Tousey (1886) 53 N. Y. Super. Ct. 56; Jones *v.* Brownlee (1901) 161 Mo. 258; Sherwood *v.* Powell (1891) 61 Minn. 479; McLaughlin *v.* Cowley (1879) 127 Mass. 316; Morrow *v.* Wheeler & Wilson Mfg. Co. (1896) 165 Mass. 349; Kemper *v.* Fort (1907) 219 Pa. St. 85; Lawson *v.* Hicks (1862) 38 Ala. 279; Ash *v.* Zwietusch (1896) 159 Ill. 455; Burdette *v.* Argile (1900) 94 Ill. App. 171; Wyatt *v.* Buell (1874) 47 Cal. 624; Hollis *v.* Meux (1886) 69 Cal. 625; Ball *v.* Rawles (1892) 93 Cal. 222; Abbott *v.* Nat. Bank of Commerce (1899) 20 Wash. 552; Lea *v.* White (Tenn. 1856) 4 Sneed 111; Crockett *v.* McLanahan (1902) 109 Tenn. 517; Lanning *v.* Christy (1876) 30 Ohio St. 115; Forbes *v.* Johnson (Ky. 1850) 11 B. Mon. 48; Monroe *v.* Davis (1904) 118 Ky. 806; Gaines *v.* Aetna Insurance Co. (1898) 104 Ky. 695; Bailey *v.* Dodge (1882) 28 Kan. 72. Affidavits: Hart *v.* Baxter (1881) 47 Mich. 198; Garr *v.* Selden (1850) 4 N. Y. 91; Beggs *v.* McCrea (N. Y. 1901) 62 App. Div. 39; Warner *v.* Paine (N. Y. 1848) 2 Sandf. 195; Suydam *v.* Moffatt (N. Y. 1848) 1 Sandf. 459; Burke *v.* Ryan (1884) 36 La. Ann. 951. Oral Comments: Hastings *v.* Lusk (N. Y. 1839) 22 Wend. 410; Nissen *v.* Cramer (1889) 104 N. C. 574; Clemmons *v.* Danforth (1895) 67 Vt. 617. See also Schultz *v.* Strauss (1906) 127 Wis. 325.

It is not probable that this rule could be applied to the constitutional immunity of members of congress and of the State legislatures. But it has been stated in connection with executive proceedings. De Arnaud *v.* Ainsworth (1904) 24 App. D. C. 167; Trebilcock *v.* Anderson (1898) 117 Mich. 39; Cook *v.* Hill (N. Y. 1849) 3 Sandf. 341.

[13]Hunckel *v.* Voneiff (1888) 69 Md. 179 (where, in an action by a female plaintiff asserting a claim against the estate of one Plitt, deceased, a witness who, with her husband, was opposing the claim, stated, in answer to a question by which it was sought to fix a certain date: "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way. If I would have, I would have noticed the date, and all those

to jurors,[14] although the courts of Kentucky, Alabama and Texas have expressed opinions favorable to that view.[15] Much judicial eloquence has been expended in support of the American doctrine.[16] Judges have been startled to think that a court of justice should be the only place where reputation may be assailed with impunity. It is freely admitted that freedom of speech is nowhere more needed than in the courts, where it has been the immemorial privilege of participants, and the guaranty of the faithful and fearless performance of their duties. But freedom of speech does not mean licentiousness. The cause of justice can never be served by the perpetration of palpable injustice, and no just rule of public policy can fail to distinguish between reasonable freedom of speech and wanton malice. A person defamed ought to be able to vin-

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little particular incidences, to save Mrs. Plitt from much heartache and trouble, and cause of her death"). A majority of the court decided "that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down." In a dissenting opinion, by two of the six judges, the view of the majority was characterized as "a departure from the well settled law on the subject. I agree that a witness is absolutely protected as to everything said by him having relation or reference to the subject matter of inquiry before the court. But if he takes advantage of his position as a witness to assail wantonly the character of another, and to utter maliciously what he knows to be false in regard to a matter that has no relation or reference to the matter of inquiry, he is, in my opinion, both on principle and authority, liable to an action of slander."

[14]Dunham *v.* Powers (1869) 42 Vt. 1 (where a juror stated in the consultation room that the plaintiff in the case on trial was a liar, and had defrauded an insurance company). A distinction is made as to the extent of the privilege growing out of the legal duty of a juror to act in that capacity, and the duty of counsel arising from his employment and consequent interest. The opinion is somewhat obscure; and the following reference to it in Clemmons *v.* Danforth (1895) 67 Vt. 617, is certainly incorrect: "This distinction between the privilege of a judge, juror, or witness, and the privilege of a party and his counsel, for words spoken or published in the course of judicial proceedings, or for the assertion of private rights in such proceedings, is generally recognized by courts of last resort in this country." It is a fair inference, however, that the Supreme Court of Massachusetts does not consider the relevancy rule applicable to judges. "It seems to be settled by the English authorities that judges, parties, counsel and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel and witnesses, that their statements made in the course of an action must be pertinent and material to the case." Rice *v.* Coolidge (1876) 121 Mass. 393; McLaughlin *v.* Cowley (1879) 127 Mass. 316.

[15]Sebree *v.* Thompson (1907) 126 Ky. 223, and Chambliss *v.* Blau (1899) 127 Ala. 86, with respect to witnesses: Runge *v.* Franklin (1889) 72 Tex. 585, with respect to pleadings. See also Terry *v.* Fellows (1869) 21 La. Ann. 375.

[16]The matter is elaborately argued in Maulsby *v.* Reifsnider (1888) 69 Md. 143.

dicate his reputation in the courts instead of taking the law into his own hands. The law would be a vain thing indeed to shut the gates of justice in his face, and at the same time fetter his hands. The short answer to this line of reasoning, from the English point of view, is that the requirement of relevancy deprives the immunity of its real value. If participants in judicial proceedings may be sued for utterances assumed to be irrelevant to the inquiry, they would be subjected to the expense and vexation incident to the defense of such an action, even though they succeed in demonstrating the pertinency of the language complained of. The liability to suit will fetter them quite as much as any apprehension of the consequences of an action. They cannot know with certainty what may be considered irrelevant, and the mere fact that they are liable to action at all deprives them of the freedom which the administration of justice demands.

In the practical application of the relevancy doctrine, the apprehensions which led to its abandonment in England have not been realized. Litigation has not been promoted, and in comparatively few cases has immunity been denied on the ground of irrelevance. On the other hand, it can hardly be asserted that an examination of the cases in which the relevancy of publications was involved demonstrates conclusively the utility of the rule.[17] In almost every

[17]The following list includes all the cases of any significance. In the following cases the publication was found to be irrelevant:

Witness. Hunckel *v.* Voneiff (1888) 69 Md. 179 (in an action by a female plaintiff asserting a claim against the estate of a Mr. Plitt, a witness, who with her husband was resisting the claim, stated in reply to a question by which it was sought to fix a certain date, "Not knowing that a mistress or woman of Mr. Plitt would step in to claim the lawful wife's property, I did not keep an account of the date that way;" irrelevant, but protected under the English rule); White *v.* Carroll (1870) 42 N. Y. 161 (in a will case, in answer to a question whether any other physician than himself had attended the testator, the witness answered, "Not as I know of; I understand he had a quack; I would not call him a physician; I understood that Dr. White, as he is called had been there"; Dr. White was a homoeopathic physician); Acre *v.* Starkweather (1898) 118 Mich. 214 (a witness who had testified on direct examination that the reputation of the defendant for truth and veracity was bad, answered, in response to a question by defendant's counsel on cross-examination as to what he based his opinion on, that the defendant was a thief, that he had stolen the witness's clothes and had been arrested for it); Crecelius *v.* Bierman (1894) 59 Mo. App. 513 (witness volunteered the statement that a memorandum on a note in evidence, on which no claim was based, was a "stupid and bungling forgery").

Counsel. Carpenter *v.* Ashley (1906) 148 Cal. 422 (words spoken by district attorney, while conducting a prosecution for larceny, charging counsel for defendant with subornation of perjury); Mower *v.* Watson (1839) 11 Vt. 536 (in an action between the same parties the defendant, acting as his own counsel, repeatedly exclaimed during the plaintiff's testimony, "That is a lie"); Hastings *v.* Lusk (N. Y. 1839) 22 Wend. 410 (charge of perjury on the part of witness); Ring *v.* Wheeler (N. Y. 1827) 7 Cow. 725 (charge of perjury); Hyde *v.* McCabe (1890) 100 Mo.

instance it would seem that the harm done could have been overcome, or at least materially minimized, in the exercise of the law-

412 (the clerk of a court filed, pursuant to statute, an affidavit in support of a motion for costs in a pending action, alleging that the plaintiff therein was insolvent. Whereupon, the attorney for the plaintiff in that action filed a counter affidavit denying the allegations set forth in the motion, and charged that the clerk's affidavit was a "corrupt, voluntary and wilful case of false swearing").

Parties. Union Mutual Life Ins. Co. *v.* Thomas (1897) 83 Fed. 803 (in an action upon a life insurance policy, where the defense was that the insured was still living, the insurance company alleged a conspiracy to defraud, and that the plaintiff and her attorneys "have no knowledge or information whatever of the death of the insured, but have alleged that he is dead for the sole purpose of carrying out the conspiracy and fraud set forth"); King *v.* McKissick (1903) 126 Fed. 215 (defendant filed an application to perpetuate testimony to be used to rebut alleged fraudulent claims against an estate, charging that the parties were asserting a claim against the estate "through the false, fraudulent and malicious representations" of the plaintiff, an attorney); Myers *v.* Hodges (1907) 53 Fla. 197 (action against a corporation of which plaintiff was president, charging him with being held as "a tricky, dishonorable, unscrupulous and conscienceless man"; stricken out as impertinent); Burdette *v.* Argile (1900) 94 Ill. App. 171 (charge of perjury in a criminal complaint); Wyatt *v.* Buell (1874) 47 Cal. 624 (on application for extension of time to file transcript on ground of illness, party charged his attorney with collusive agreement with opposing attorney); Grant *v.* Haynes (1900) 105 La. 304 (in an action for commissions under a promotion contract, the defendants denied that the plaintiff had secured any subscriptions, and alleged that they had learned that his reputation was such that he could not secure subscriptions); Harlow *v.* Carroll (1895) 6 App. D. C. 128 (in answer to an action for the restoration of personal property deposited with defendant as security for payment of a loan, it was alleged that "respondent was informed by a detective who had been employed to look up complainant's antecedents and past career that she was a procuress and engaged in other unlawful practices, and was of no veracity or reputation"); McLaughlin *v.* Cowley (1879) 127 Mass. 316 (in an action, brought by one to recover damages for losses sustained in consequence of employing plaintiff, against one who made false representations as to his trustworthiness, the complaint, after stating the false representations, proceeded to charge the plaintiff with causing an illegitimate child to be put to death); Sherwood *v.* Powell (1895) 61 Minn. 479 (in an action to recover money collected after a mutual dissolution of copartnership under an agreement that the defendant should collect all moneys and pay over one half to plaintiff, the answer, after admitting the agreement, alleged, "That plaintiff failed utterly to perform his contract of partnership with the defendant, but during the time aforesaid spent his time in consorting with idlers and people of abandoned character, and used the office of the partnership as a place of assignation"); Gilbert *v.* People (N. Y. 1845) 1 Denio 41 (complaint in trespass for killing sheep alleged that defendant was reputed to be fond of sheep, etc.); Moore *v.* Mfrs. Nat. Bank (1890) 123 N. Y. 420 (defendant, claiming that its cashier had embezzled funds, brought an action against the sureties on his bond, and, upon request, delivered to an agent of the sureties a paper containing an itemized account of the alleged defalcations which included items described as "cash items drawn from the bank by collusion with the teller without the knowledge or authority of the officers of the bank," and the statement was subsequently repeated in a bill of particulars furnished on demand of counsel for the sureties; the teller was not a party to the proceeding); Clemmons *v.* Danforth (1895) 67 Vt. 617 (defendant appeared before commissioners to resist the allowance of a claim against the estate of a deceased person, and said of the claimant, "This isn't the first time he has made up an account either. He made up one against me"); Kean *v.* McLaughlin (Pa. 1816)

ful powers of the presiding judge. Moreover, this restriction has

2 S. & R. 469 (verdict for plaintiff affirmed where defendant pleading his own cause said to a witness after he had finished his testimony, "You have sworn to a manifest lie").

In the following cases the publication was found to be relevant:

Witness. Cooper *v.* Phipps (1893) 24 Ore. 357 (a witness in a divorce case, in the course of her narrative, coupled the name of the plaintiff with that of the defendant in the divorce case, her sister, in an accusation of unchastity); Calkins *v.* Sumner (1860) 13 Wis. 215 (a witness testifying concerning the reputation of the plaintiff stated in answer to direct questions, "In a case between myself and him for sand he swore it on me. I thought he would swear to the truth, but he swore to a lie"); Hendrix *v.* Daughtry (1907) 3 Ga. App. 481 (on the trial of plaintiff for arson witness testified in answer to questions by counsel that the plaintiff stole money from him, and that he could prove it by the plaintiff's mother-in-law); Barnes *v.* McCrate (1851) 32 Me. 442 (in an inquiry into the cost of storing plaintiff's goods, which had been seized for alleged breach of the revenue laws, the owner of the store, who was called as a witness by the collector of the port testified that the charge made by him to the collector was a fair charge under the circumstances, but would be a large one in ordinary cases. Asked why in the particular case more was charged than usual, the witness replied, "The Messrs. Clark would not store the goods for fear that Barnes would set their property on fire, and I did not wish to store them because he might set my buildings on fire again. He set my building, the custom house, on fire, and he has set fire to two other buildings"); Cooley *v.* Galyon (1902) 109 Tenn. 1 (reflection by one builder upon the business conduct of another in an inquiry into the cost of construction); Sebree *v.* Thompson (1907) 126 Ky. 223 (accusation of perjury); Buschbaum *v.* Heriot (Ga. 1909) 63 S. W. 645; Conley *v.* Key (1895) 98 Ga. 115 (impeachment of veracity).

Counsel. Maulsby *v.* Reifsnider (1888) 69 Md. 143 (in an action by an attorney to recover money alleged to be due him for professional services, the defendant's attorney charged that the plaintiff had collected a large sum for the defendant and had refused to pay it over); Stackpole *v.* Hennen (La. 1828) 6 Martin, N. S. 481 (counsel cross-examining a witness asked by the court what object he had in view in putting certain questions, answered that he wished to show that the witness was perjured); Youmans *v.* Smith (1897) 153 N. Y. 214 (attorney for petitioner in disbarment proceedings submitted to persons expected to be called as witnesses questions relating to the charges upon which the proceeding was based); Sickles *v.* Kling (N. Y. 1901) 60 App. Div. 515 (language used by counsel in a brief alleged to impute unchastity); Marsh *v.* Ellsworth (1872) 50 N. Y. 309 (charge of subornation of perjury); Shelfer *v.* Gooding (1855) 47 N. C. 175 (statement of master defending his slave that the testimony against him was "a tissue of falsehood and a damned lie from beginning to end"); Jennings *v.* Paine (1855) 4 Wis. 358 (charging witness with perjury). In Georgia (where the comments of counsel are by statute only conditionally privileged) where counsel in summing up a prosecution for criminal mischief in killing hogs, accused the plaintiff who had been implicated in the evidence and was not a witness, with assisting the accused in killing the hogs, a verdict for defendant was affirmed on the ground that there was no proof of malice.

Parties. McGehee *v.* Insurance Company (1902) 112 Fed. 853 (allegations in answer to an action on a fire insurance policy charging that plaintiff had burned the insured property, thereby avoiding the policy); Bailey *v.* Dodge (1882) 28 Kan. 72 (an affidavit for a search warrant alleged that plaintiff stole the property); Ash *v.* Zwietusch (1896) 159 Ill. 455 (allegation in the answer to an action by a salesman for an accounting that the complainant was discharged for embezzlement); Lea *v.* White (Tenn. 1856) 4 Sneed 111 (in a *habeas corpus* proceeding the defendant stated in his return that the abducted person, a free minor of color, whose custody was the subject of controversy, was taken from the petitioner, and the order of indenture revoked by the court, because the

entailed further confusion in terminology.[18] Although the original, and still the usual, term is "relevant," or "pertinent," the tendency is toward a broader terminology. "Having reference or relation" to the subject matter is the statement of the American rule made by some courts;[19] which, it is to be observed, is precisely the manner in which the broader English rule is stated by later authorities.[20] Some of the applications of the rule reveal the vanishing point of relevancy, in the ordinary sense of that term, and seem to justify a broader and less technical terminology.[21]

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petitioner was insolvent and unable to support her; that she had been cruelly maltreated, and that there was reason to believe that the petitioner would sell her into slavery); Nissen *v.* Cramer (1889) 104 N. C. 574 (agent of a corporation asserted that plaintiff's testimony was a lie); Badgley *v.* Hedges (1807) 2 N. J. L. 233 (defendant asserted that the testimony of a witness was a lie).

[18]The requirement that publications must be relevant has been incorrectly called qualified privilege. Bartlett *v.* Christhilf (1888) 69 Md. 219; Sebree *v.* Thompson (1907) 126 Ky. 223; Wyatt *v.* Buell (1874) 47 Cal. 624; Acre *v.* Starkweather (1898) 118 Mich. 214; Hendrix *v.* Daughtry (1907) 3 Ga. App. 481; Sickles *v.* Kling (N. Y. 1899) 30 Misc. 37; (1900) 31 Misc. 287; Kemper *v.* Fort (1907) 219 Pa. St. 85; Hollis *v.* Meux (1886) 69 Cal. 625; Maulsby *v.* Reifsnider (1888) 69 Md. 143. Qualified privilege, in the sense in which it has been uniformly used in the law of defamation, implies the materiality of malice; but relevant publications are absolutely protected, although malicious. Occasionally the terms "*prima facie*" and "presumptively" have been used to describe the privilege. Calkins *v.* Sumner (1860) 13 Wis. 193; McNabb *v.* Neal (1900) 88 Ill. App. 571; Hutchinson *v.* Lewis (1881) 75 Ind. 55; Crecelius *v.* Bierman (1894) 59 Mo. App. 513; Cooper *v.* Phipps (1893) 24 Ore. 357.

[19]Hoar *v.* Wood (Mass. 1841) 3 Metc. 193, *per* Shaw, C. J.; Hart *v.* Baxter (1881) 47 Mich. 198, *per* Cooley, J.; Jennings *v.* Paine (1855) 4 Wis. 358; Cooper *v.* Phipps (1893) 24 Ore. 357.

[20]Dawkins *v.* Rokeby (1875) L. R. 7 H. L. 744; Munster *v.* Lamb (1883) 11 Q. B. D. 588. In Seaman *v.* Netherclift (1876) 2 C. P. D. 53, Bramwell, J. A. said: "I am by no means sure that the word 'relevant' is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in Dawkins *v.* Lord Rokeby would seem preferable, 'having reference' or 'made with reference to the inquiry.'" This language is quoted with approval in Maulsby *v.* Reifsnider (1888) 69 Md. 162, where the court says: "We quite agree, however, with Bramwell, J. A. in Seaman v. Netherclift that 'relevant' and 'pertinent' are not the best words that could be used. These words have in a measure a technical meaning, and we all know the difficulty in determining in some cases what is relevant or pertinent. With Lord Chancellor Cairns we prefer the words 'having reference' or 'made with reference,' or in the language of Shaw, C. J. [in Hoar *v.* Wood] 'having relation to the cause or subject matter.'" But Lord Justice Bramwell, and presumably, Lord Chancellor Cairns, were defining the English doctrine of absolute immunity, while Chief Justice Shaw had in mind the American doctrine of relevancy. Some courts have apparently misunderstood the import of the English doctrine; as in McDavitt *v.* Boyer (1897) 169 Ill. 475, where Hunckel *v.* Voneiff (1888) 69 Md. 179, adopting the English rule with respect to witnesses, is cited in support of the relevancy doctrine.

[21]As in Youmans *v.* Smith (1897) 153 N. Y. 210, with respect to proposed testimony. The method of stating the doctrine in Union Mutual Life Ins. Co. *v.* Thomas (1897) 83 Fed. 803, is almost as broad as the English rule. "Contrary to the rule of the English Courts, the American Courts have established the doctrine that the matter inserted in a pleading

At all events, it is held that doubts are to be resolved in favor of relevancy and pertinency; that is to say, the matter to which the privilege does not extend must be so palpably wanting in relation to the subject matter of the controversy that there can be no reasonable doubt of its impropriety.[22] Mere coarseness of expression will not destroy the immunity.[23]

Some presumptions have been formulated which are of material assistance in the practical application of the rule to witnesses and counsel. The disinterested witness occupies a position which requires the widest latitude in administering the rule. Witnesses usually appear in the compulsory performance of a public duty, and it is essential to the due administration of justice that they should testify fully and freely.[24] The great majority of persons called upon to testify in courts of justice are quite ignorant of the technical rules of evidence by which legal proceedings are governed; and if they were not, they are, in most instances, unacquainted with the true nature of the controversy and the exact condition of the issue between the parties. So they are generally in no position to determine for themselves the materiality or pertinency of answers to particular questions. Moreover, it is not for them to decide such questions. The law has imposed that duty exclusively upon the courts. Hence the rule is universal that a witness is *prima facie* protected in all cases. Where the answers

in court is privileged only when connected with the subject-matter of the litigation. It is perhaps not necessary that it be in all cases material to the issues presented by the pleadings, but it must be legitimately related thereto, or so pertinent to the subject of the controversy that it may in the course of the trial become the subject of inquiry."

[22]Kemper *v.* Fort (1907) 219 Pa. St. 85; Harlow *v.* Carroll (1895) 6 App. D. C. 128; Myers *v.* Hodges (1907) 53 Fla. 197. "Courts should construe all things said in judicial proceedings liberally." Bailey *v.* Dodge (1882) 28 Kan. 72. Youmans *v.* Smith (1897) 153 N. Y. 219, where printed questions submitted by counsel to proposed witnesses in the preparation of a case were held to be privileged on the ground that "they were not so manifestly immaterial that under no circumstances could they be asked upon the trial." "It is difficult, if not impossible, to find a case where either [party or counsel] has been held liable except where the matter spoken or published was grossly and palpably impertinent. Where it is fairly debatable whether the matter is relevant or not, we would incline to giving the party or counsel using the words the benefit of the doubt which may fairly exist as to its pertinency." Warner *v.* Paine (N. Y. 1848) 2 Sandf. 195. "So long as they can be deemed to be possibly pertinent, so long are they protected." Sickles *v.* Kling (N. Y. 1901) 60 App. Div. 515. An affidavit is protected "if fairly relevant to the issue, or responsive to some fact apparently bearing on the issue to which it is directed." Hyde *v.* McCabe (1890) 100 Mo. 412.

[23]Warner *v.* Paine (N. Y. 1848) 2 Sandf. 195; Hoar *v.* Wood (Mass. 1841) 3 Metc. 193; Gardemal *v.* McWilliams (1891) 43 La. Ann. 454; Klinck *v.* Colby (1871) 46 N. Y. 427; Hart *v.* Baxter (1881) 47 Mich. 198; Burdette *v.* Argile (1900) 94 Ill. App. 171.

[24]Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461; Chambliss *v.* Blau (1899) 127 Ala. 86.

given by him are in direct response to questions propounded to him by court[25] or counsel,[26] he is absolutely protected.[27] If the question was put by the court, there could be no liability for answering it; if put by the plaintiff's counsel, the plaintiff can have no ground of complaint that it was answered; if put by the defendant's counsel, objection should have been made, and, if improper, it would have been excluded.[28] A witness is not answerable, therefore, for statements which he may make in direct response to questions put to him which are not objected to and excluded by the court, or concerning the impertinency or impropriety of which he receives no advice from the court. Witnesses testify under the guidance of the court, and they may safely rely upon the silence of the court or the absence of objection on the part of counsel.[29] The question of materiality is waived and concluded by counsel's failure to object to the question or answer, or to move to exclude the testimony.[30] For statements

[25]Calkins *v.* Sumner (1860) 13 Wis. 215; Wright *v.* Lothrop (1889) 149 Mass. 385.

[26]Hendrix *v.* Daughtry (1907) 3 Ga. App. 481; Cooper *v.* Phipps (1893) 24 Ore. 357.

[27]Crecelius *v.* Bierman (1894) 57 Mo. App. 513; Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461; Buschbaum *v.* Heriot (Ga. 1909) 63 S. E. 645. "If witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected." Wright *v.* Lothrop (1889) 149 Mass. 385.

[28]Barnes *v.* McCrate (1851) 32 Me. 442.

[29]Calkins *v.* Sumner (1860) 13 Wis. 193; Acre *v.* Starkweather (1898) 118 Mich. 214; Perkins *v.* Mitchell (N. Y. 1860) 31 Barb. 461.

[30]Hendrix *v.* Daughtry (1907) 3 Ga. App. 481. See also Buschbaum *v.* Heriot (Ga. 1909) 63 S. E. 645. The mayor of a city was summoned to appear as a witness before a legislative committee appointed at a time when the community was suffering from a great and unusual scarcity of coal to ascertain whether any attempt was being made to corner the market. The witness stated that he had had some experience in attempting to secure coal for the people of the city, whereupon the chairman said to him, "The committee would like to hear about it in your own way." In response the witness made a long statement, in the course of which occurred the allegations complained of. Although these statements were found to be plainly pertinent to the subject before the committee, and therefore privileged, the court said: "Under these circumstances the witness, as he went on, had the right to assume that if he stated anything not wanted by the committee he would be interrupted by the chairman; and that, in the absence of any such interruption, he was giving the information for which the chairman asked, exactly as if the question had been more specific and the statements were made in answer thereto. If so, the statements being responsive to the question, were pertinent within the meaning of the rule." Sheppard *v.* Bryant (1906) 191 Mass. 591. "Where the action is for words spoken upon the witness stand, the question is, not as to the pertinency or relevancy of the testimony, but whether they were spoken by the witness without being stopped by the court or counsel and under the supposition that they were relevant." Steinecke *v.* Marx (1881) 10 Mo. App. 580.

volunteered, or not in response to questions by court or counsel, the witness is also protected so long as such statements are relevant and material to the issue; but he will not be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry.[31]

The doctrine has necessarily been applied with similar latitude in relation to comments by counsel. The position of an advocate would be perilous if he were held strictly responsible for the exercise of his judgment. The matter to which his immunity does not extend must be so palpably wanting in relation to the subject-matter of the controversy that its irrelevance and impropriety are plainly apparent. Advocacy implies argument. A wide latitude is necessarily allowed in the interest of truth and justice, for no counsel could perform his duty if he were personally responsible for the force of his deductions or inferences and the strength of his expressions. That they are extreme or only specious or colorable, is not the test, but whether they are pertinent. This is but the principle of free speech in the administration of justice. It protects persons defamed by providing redress for accusations without foundation in fact, and it protects the advocate by assuring to him the play of his reason within the facts. The advocate does not speak mindful of another day when he will be called upon to justify his inferences as if they had been charged as facts, or to vindicate his conclusions by the axioms of logic. His conclusions may be lame and impotent, his inferences far fetched and feeble, but so long as they can possibly be deemed to be pertinent they are not actionable.[32]

It does not necessarily follow, however, that every publication in judicial proceedings which is irrelevant to the issue is actionable. Such a publication, although not absolutely protected, may nevertheless be the subject of conditional immunity under the ordinary doctrine of interest or duty upon which conditional immunity is based. The question of malice then becomes the controlling factor. But the inference of malice is not drawn, as a matter of law, because the publication on such an occasion was irrelevant; it must affirmatively appear that it was also malicious. In other words, a publication in the course of a judicial proceed-

[31]Wright *v.* Lothrop (1889) 149 Mass. 385; Acre *v.* Starkweather (1898) 118 Mich. 214; Barnes *v.* McCrate (1851) 32 Me. 442.

[32]Sickles *v.* Kling (N. Y. 1901) 60 App. Div. 515, 31 Misc. 289; Harlow *v.* Carroll (1895) 6 App D. C. 128; Stewart *v.* Hall (1885) 83 Ky. 375; Youmans *v.* Smith (1897) 153 N. Y. 219; Hoar *v.* Wood (Mass. 1841) 3 Metc. 193; Shelfer *v.* Gooding (1855) 47 N. C. 175.

ing, if relevant, will not support an action for defamation; nor when irrelevant, if the speaker or writer believed that it was relevant, and had reasonable grounds for so believing.[33] The same

[33]Lawson *v.* Hicks (1862) 38 Ala. 279; Mower *v.* Watson (1839) 11 Vt. 536; Hoar *v.* Wood (1841) 3 Metc. 193; Johnson *v.* Brown (1878) 13 W. Va. 71; Nissen *v.* Cramer (1889) 104 N. C. 576; White *v.* Carroll (1870) 42 N. Y. 161, as explained in Marsh *v.* Ellsworth (1872) 50 N. Y. 309; Wilson *v.* Sullivan (1888) 81 Ga. 238; Myers *v.* Hodges (1907) 53 Fla. 197; Dunham *v.* Powers (1869) 42 Vt. 1; Calkins *v.* Sumner (1860) 13 Wis. 193; Hyde *v.* McCabe (1890) 100 Mo. 412. "If the party using them was not actuated by malice, but in good faith believed that they were material in the case, and the attending circumstances justified the belief, then he is not liable. If under all the circumstances he may deem the statement reasonably necessary to his cause, and there is an absence of malice as a cloak for defamation, then public policy requires that he should not be held liable." Stewart *v.* Hall (1885) 83 Ky. 375.

The cases in which this rule has been applied, classified according to participants, are:

Judge: Aylesworth *v.* St. John (N. Y. 1881) 25 Hun 156.

Jurors: Rector *v.* Smith (1860) 11 Ia. 302.

Witnesses: White *v.* Carroll (1870) 42 N. Y. 161, as explained in Marsh *v.* Ellsworth (1872) 50 N. Y. 309; Crecelius *v.* Bierman (1894) 59 Mo. App. 513; Lamberson *v.* Long (1896) 66 Mo. App. 253; Cooper *v.* Phipps (1893) 24 Ore. 357; Hutchinson *v.* Lewis (1881) 75 Ind. 55; Shadden *v.* McElwee (1887) 86 Tenn. 146, as explained in Cooley *v.* Galyon (1902) 109 Tenn. 1; Calkins *v.* Sumner (1860) 13 Wis. 193; Smith *v.* Howard (1869) 28 Ia. 51; Hendrix *v.* Daughtry (1907) 3 Ga. App. 481; Buschbaum *v.* Heriot (Ga. 1909) 63 S. E. 645; Acre *v.* Starkweather (1898) 118 Mich. 214.

Counsel: Mower *v.* Watson (1839) 11 Vt. 536; Hastings *v.* Lusk (N. Y. 1839) 22 Wend. 410; McDavitt *v.* Boyer (1897) 169 Ill. 455; Hyde *v.* McCabe (1890) 100 Mo. 412; Stewart *v.* Hall (1885) 83 Ky. 375.

Parties: Myers *v.* Hodges (1907) 53 Fla. 197; Johnson *v.* Brown (1878) 13 W. Va. 71; Nissen *v.* Cramer (1889) 104 N. C. 576; Mower *v.* Watson (1839) 11 Vt. 536; Burdette *v.* Argile (1900) 94 Ill. App. 171; Union Mutual Life Ins. Co. *v.* Thomas (1897) 83 Fed. 803; Gardemal *v.* McWilliams (1891) 43 La. Ann. 454; Warner *v.* Paine (N. Y. 1848) 2 Sandf. 195; Lawson *v.* Hicks (1862) 38 Ala. 279.

In Johnson *v.* Brown (1878) 13 W. Va. 71, it is stated that some courts have further qualified the rule by holding that impertinent publications would be absolutely privileged if the party could show that he had reasonable cause to believe, and did in fact believe, that the matter was true and pertinent, citing Suydam *v.* Moffatt (N. Y. 1848) 1 Sandf. 459; White *v.* Carroll (1870) 42 N. Y. 161, and Lea *v.* White (Tenn. 1856) 4 Sneed 111. This is hardly a correct statement of the New York cases. The Tennessee cases on the subject are much confused in consequence of the persistent use of the term probable cause; and the language used often goes beyond the actual decision. Shadden *v.* McElwee (1887) 86 Tenn. 146. In Buschbaum *v.* Heriot (Ga. 1909) 63 S. E. 645, however, the court asserts that "where a witness falsely and maliciously volunteers statements which are defamatory, and which in no way illustrate any of the issues pending for solution before the court or jury, such statements are not privileged unless the witness *bona fide* believes the statements made by him to be true, and makes them believing in good faith that they are material; both of which facts are for the jury. In the latter case his privilege protects him no matter how great his malice."

A further examination of the situation of parties in the absence of absolute privilege, and of the force and effect of malice, more properly belongs to the subject of conditional immunity. Reference may be made, however, to the following cases in which absolute immunity was claimed: Moore *v.* Mfrs. Nat. Bank (1890) 123 N. Y. 420; McLaughlin *v.* Cowley (1879) 127 Mass. 316; Clemmons *v.* Danforth (1895) 67 Vt. 617.

rule applies to publications not made "in office," [34] and, presumably, to publications made in the course of judicial proceedings where the court was without jurisdiction.[35]

When the facts are not in dispute, relevancy, like privilege, is a question of law for the court.[36] And the burden of proof is upon him who alleges irrelevance, unless such irrelevance is disclosed by the complaint, or otherwise appears on the trial.[37]

VAN VECHTEN VEEDER.

NEW YORK.

[34]"But in actions for defamatory words against a member [of the legislature] he may, in cases to which his privilege does not extend, defend himself like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man." Coffin *v.* Coffin (1808) 4 Mass. 1. See also Maurice *v.* Worden (1880) 54 Md. 233. A good illustration is the case of Wright *v.* Lothrop (1889) 149 Mass. 385, where the owner of a building which had been found by a jury to have been destroyed by the negligence of a tenant at will, stated to a legislative committee which had under consideration a bill making tenants at will liable for such negligence that his tenant had wilfully burned his building, though he could not prove it. The court reversed a direction for the defendant on the ground that the question whether this was a privileged communication, as made by the owner in good faith and without malice, was for the jury. "There was some evidence, however, as we construe the exceptions, that the defendant was not a witness, and was not so considered or treated by the committee, but that he appeared before the committee voluntarily to call attention to the state of the law on the subject of the liability of tenants at will for the negligent burning of buildings in their possession, and to urge the committee to report a bill changing the law, and that he made the statement without being asked a question upon the subject. The defendant had the interest which all citizens have in procuring wise legislation, and his attention had been particularly called to what he may have deemed a defect in the law. In asking Mr. Boyden, a member of the House of Representatives, to introduce the order, and in appearing before the committee to which the order had been referred, it must be considered that he was acting in a matter which legitimately concerned him, and was making communications to persons who had authority to deal with the subject, and that such communications are privileged if they are made in good faith and without malice. The privilege is conditional, not absolute."

[35]If it appear that the libelous allegations were published in the due course of legal procedure, though it be proved that the court had no jurisdiction, or that the allegations were not pertinent to the legal procedure, still the law does not presume malice on the part of the defendant; but the plaintiff must prove express malice to entitle him to recover. The simple fact that the libelous matters were published in the course of legal procedure * * * rebuts the *prima facie* presumption of malice, and makes it incumbent on the plaintiff to prove express malice; the case being what is called a conditionally privileged publication." Johnson *v.* Brown (1878) 13 W. Va. 71.

[36]Harlow *v.* Carroll (1901) 6 App. D. C. 128; Sickles *v.* Kling (N. Y. 1901) 60 App. Div. 515; Jones *v.* Brownlee (1901) 161 Mo. 258; Myers *v.* Hodges (1907) 53 Fla. 197.

[37]Mower *v.* Watson (1839) 11 Vt. 536; Calkins *v.* Sumner (1860) 13 Wis. 193; Johnson *v.* Brown (1878) 13 W. Va. 71; Cooper *v.* Phipps (1893) 24 Ore. 357; Crecelius *v.* Bierman (1894) 59 Mo. App. 513; Hutchinson *v.* Lewis (1881) 75 Ind. 55; Liles *v.* Gaster (1885) 42 Ohio St. 631. But see Moore *v.* Mfrs. Nat. Bk. (1890) 123 N. Y. 420; Clemmons *v.* Danforth (1895) 67 Vt. 617; Torrey *v.* Field (1838) 10 Vt. 353.